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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

70-268

No. ~~1813~~

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

versus

THE DAY COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
I. Decision in Conflict With Applicable Georgia Law	8
(a) Dulaney an Independent Dealer	9
(b) Covenant extended beyond permissible Geographic Area	11
II. The Public Policy of Georgia Has Been Ignored	13
Conclusion	14
Appendix I	
Opinion of District Court	A-1
Appendix II	
Opinion of United States Court of Appeals for the Fifth Circuit	A-12
Appendix III	
Judgment	A-15

Table of Cases Cited

Angel v. Bullington, 330 U.S. 183	13
Central Georgia Land & Lumber Company v. Exchange Bank of Macon, 101 Ga. 345, 28 S.E. 863	9

Colonial Life & Accident Insurance Company v. Byrd, 227 Ga. 198, 179 S.E. 2d 746 12

Daniel v. Maddox-Rucker Banking Company, 124 Ga. 1063, 53 S.E. 573 10

Day Companies v. Patat, 5 Cir., 403 F. 2d 792 2

Edwin K. Williams & Co.-East v. Padgett, 226 Ga. 613, 176 S.E. 2d 800 12

Erie Railroad Company v. Tompkins, 304 U.S. 64 ..6, 8, 14

Fox v. Avis Rent-A-Car Systems, Inc., 223 Ga. 571, 156 S.E. 2d 910 .....5, 11

Guaranty Trust Company v. York, 326 U.S. 99, Certiorari was denied, 397 U.S. 1111, 89 S. Ct. 993, 22 L.Ed. 2d 122 ..... 6, 8

Meredith v. City of Winter Haven, 320 U.S. 328 .....8, 13

Moore v. Dwoskin, Incorporated, 226 Ga. 835, 177 S.E. 2d 708 12

Taylor Publishing Company v. Jones, 226 Ga. 832, 177 S.E.2d 655 12

Vandenbark v. Owens Illinois Glass Company, 311 U.S. 538 .....8, 13

Wood v. McKinney, 205 Ga. 370, 371, 53 S.E. 2d 684 12

Miscellaneous Cited

28 U.S.C., Section 1254 2

28 U.S.C., Section 1332 2

28 U.S.C., Section 1652 .....2, 3, 9

Georgia Code, Section 20-504 .....3, 5, 13

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To the United States Court of Appeals for the Fifth Circuit

Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case on April 16; 1971.

OPINIONS BELOW

The opinion of the District Court, on which an injunction was granted in favor of respondent, has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals, affirming the grant of an injunction, has not been reported. A copy is appended as Appendix II.

A copy of the judgment is appended as Appendix III.

This case was previously considered by the Fifth Circuit Court of Appeals. **Day Companies v. Patat**, 5 Cir., 403 F. 2d 792.

Petition for certiorari to review the previous decision of the Fifth Circuit Court of Appeals was denied, 397 U.S. 1111, 89 S. Ct. 993, 22L. Ed. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1971. No Petition for Re-hearing was filed.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was initially invoked by respondent at the time of filing the original complaint on the ground of diversity of citizenship and amount involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTIONS PRESENTED

I. Whether in its opinion affirming the decision of the District Court, the Fifth Circuit Court of Appeals contrary to the Rules of Decision Act (**Title** 28, **Section** 1652, **United States Code**,) decided an important State question in a way in conflict with applicable Georgia law.

II. Whether in its opinion affirming the decision of the District Court, the Fifth Circuit Court of Appeals failed to apply the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort.

STATUTES INVOLVED

The only United States statute involved is **Title 28, Section 1652, United States Code,** which provides:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as Rules of Decision of Civil actions in the courts of the United States, in cases where they apply."

The applicable Georgia Statute is **Georgia Code Section 20-504** which provides:

> "**Contracts against public policy; illustrations.**—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty."

STATEMENT OF THE CASE

The Day Companies, Inc., a Mississippi corporation, alleging itself to be successor by merger to Columbus Packing Company, Inc., invoking jurisdiction upon the basis of diversity of citizenship and amount involved, instituted an action for injunctive relief and damages in the Rome Division of the United States District Court for the Northern District of Georgia against Patat Plywood Corporation, a Georgia corporation, and Claud T. Patat, Jr. and John L. Farris, Georgia residents.

The complaint alleged that Farris Plywood Company, a Georgia corporation of which John L. Farris was president and principal stockholder, located at Cuthbert,

Georgia, engaged in the manufacture of plywood, and having earned surplus and undistributed profits in excess of $400,000.00, was acquired by Columbus Packing Company, Inc., on April 20, 1966, through the purchase of all of its outstanding capital stock for an aggregate sum of $465,000.00 from John L. Farris, Mrs. Nora Lee Farris, Mrs. Lois Farris McLendon and Carolyn Farris. Claud T. Patat, Jr., was the manager of said corporation.

The contract of sale provided in part that John L. Farris would remain in the employ of the company in an advisory and consulting capacity until December 31, 1966, at a salary of $500.00 per month and contained the further proviso that

> "... the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

The contract further provided that the salary of Claud T. Patat, Jr., of $1,000.00 per month would be continued for the remainder of 1966, and that he be paid a bonus of $10,000.00 December 31, 1966, which obligations were complied with by Columbus Packing Company, Inc. All common stock in Farris Plywood Company was transferred to Columbus Packing Company, Inc., which became sole stockholder and owner of Farris Plywood.

It was further alleged that Claud T. Patat, Jr., together with Francis E. Patat, and Claud T. Patat, Sr., incorporated Patat Plywood Corporation in Polk County, Georgia, March 15, 1967, which company began business March 22, 1967, with Claud T. Patat, Jr., as President

and John L. Farris as Vice President and Treasurer, and that Patat Plywood Corporation was engaging in the manufacture and production of plywood which it is selling in the same area in which Farris Plywood was operating on April 20, 1966, and in which the Day Companies, Inc., is still operating.

The complaint further alleged that defendants Patat and Patat Plywood Company had knowledge of the terms of the contract signed by John L. Farris, and with full knowledge thereof are aiding and abetting John L. Farris to violate his contract in that he is connected with and concerned in a business and employment in direct competition with the plaintiff in the area operated in by Farris Plywood Company at the time the contract was executed, thereby causing the plaintiff irreparable damage, and that plaintiff had been damaged in the sum of $100,000.00 by the combined acts of the defendants. Injunctive relief and damages in the sum of $100,000.00 were sought.

Defendants filed a Motion to Dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, averring that the covenant not to compete was contrary to the public policy of the State of Georgia (**Georgia Code Section** 20-504), and so indefinite as to the description of the business and employment sought to be prohibited as to be unreasonable.

The District Court, relying upon the latest decision of the Supreme Court of Georgia, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S.E. 2d 910, entered an order dismissing the complaint. Respondent appealed from such dismissal, and upon review the Fifth Circuit Court of Appeals reversed the judgment and remanded the case for further proceedings consistent with the views expressed in its opinion.[1]

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[1] The opinion of the Fifth Circuit Court of Appeals (403 F.2d 792), contained no reference whatever to **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S.E.2d 910.

Appellants thereupon sought the grant of certiorari under the doctrine of **Erie Railroad Company v. Tompkins**, 304 U.S. 64, and **Guaranty Trust Company v. York**, 326 U.S. 99, upon the ground of "substantially different" result reached from that which would have been reached by the Georgia Courts. Certiorari was denied, 397 U.S. 1111, 89 S. Ct. 993, 22 L.Ed. 2d 122.

Following receipt of the mandate from the Fifth Circuit Court of Appeals, the District Court heard the injunctive feature of the case and granted an injunction in favor of plaintiff. While as entered the injunction prohibited sale to or solicitation of orders from 25 concerns located throughout the United States, the evidence adduced at the hearing established without substantial dispute that from the inception of Farris Plywood Company as an operating entity

(a) Dulaney Plywood Corporation of Louisville, Kentucky purchased its entire output;

(b) Dulaney sold such plywood to its own customers at prices determined by it;

(c) Dulaney directed Farris to ship same f.o.b. Cuthbert, Georgia, to such customers;

(d) The shipments were made under bills of lading showing Dulaney as the "consignor" or "shipper";

(e) Farris was paid by Dulaney without regard to whether or not Dulaney ever collected from its customers for the goods so shipped;[2] and

(f) Dulaney — not Dulaney's customers — received Title to the goods from Farris.

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[2] The balance sheet attached to and made a part of the contract between Columbus Packing Company and Farris listed as its only substantial receivable "Dulaney Plywood Corporation $89,806.48."

The evidence further established **two** matters of **critical significance** involving actions of the plaintiff itself **prior** to the incorporation of Patat Plywood Corporation, viz.:

(a) First, on September 20, 1966, plaintiff informed Dulaney it intended to terminate the long standing arrangement and "sell our product direct" which agitated Dulaney who stated "I will get me another source of supply, and we will fight it out." Plaintiff then contracted to pay Dulaney $12,500.00 per year for two years; $15,000.00 to C. M. Hilton (one of Dulaney's employees) for one year; and $7,500.00 to Miss Edith Loveless (another Dulaney employee) for one year. Thus plaintiff acquired the sales organization of Dulaney.

(b) Secondly, on November 14, 1966, Farris Plywood Company was dissolved by an order of the Superior Court of Randolph County, Pataula Judicial Circuit. Plaintiff thereby terminated the existence of the Georgia corporation with which petitioner John L. Farris had covenanted to not compete.

In its decision the Fifth Circuit Court of Appeals considered

> ". . . the covenant applied to all those customers who were purchasing manufactured goods produced by Farris at the time he sold the business."

The fundamental legal concepts implicit in Plaintiff

(a) Purchasing Dulaney's sales organization in order to secure unrestricted access to his customers; and

(b) Dissolving Farris Plywood Company as a corporate entirely so that competition with it would no longer be possible;

have been completely glossed over and lost sight of.

REASONS FOR GRANTING THE WRIT

I. By its decision in the instant case the Fifth Circuit Court of Appeals has decided important State questions in a way clearly in conflict with applicable Georgia law contrary to the Rules of Decision Act (Title 28, Section 1652, United States Code), and thus ignored this Court's admonition in **Erie Railroad Company v. Tompkins**, 304 U.S. 64, and **Guaranty Trust Company v. York**, 326 U.S. 99.

II. By its decision in the instant case the Fifth Circuit Court of Appeals failed to follow, and in fact completely ignored, the most recent interpretations of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort, and thus ignored this court's admonition in **Vandenbark v. Owens Illinois Glass Company**, 311 U.S. 538, and **Meredith v. City of Winter Haven**, 320 U.S. 328.

I

Decision in Conflict With Applicable Georgia Law

Petitioners are mindful that their previous request for review did not commend itself to the Court's discretion. At that time, however, the Court had before it only the complaint, as amended, motion to dismiss, and opinions of the District Court dismissing the complaint and of the Fifth Circuit reversing the dismissal. The documentary evidence, depositions, and oral testimony summarized hereinbefore and in the District Court's opinion [Appendix I] now point up the extent to which the respondent has secured a "substantially different" result from that which would have been afforded in the Georgia Courts, and that petitioners have been denied the safeguards of the Rules

of Decision Act [Title 28, Section 1652, United States Code]. The decisions as entered, both of the District Court and Fifth Circuit Court of Appeals (Appendix I and II) ignore the holdings of the Supreme Court of Georgia with respect to

(a) The relationship between Farris Plywood Company and Dulaney Plywood Corporation; and

(b) The geographic area encompassed by the covenant not to compete.

(a)

Dulaney an Independent Dealer

The holding that Dulaney Plywood Corporation was a "sales agent" is contrary to the rule which has obtained in Georgia since 1893, when in **Central Georgia Land & Lumber Company v. Exchange Bank of Macon**, 101 Ga. 345, 28 S.E. 863, the Supreme Court held that:

> "One who, on his own account, engages in the business of purchasing goods for the purpose of filling orders received by him from others, and who in fact fills the same at places therein specified, looking for his profits to the difference between what he pays and what he receives in these transactions, is not, though in each instance the order is received before the purchase is made, the agent of the persons by whom the orders are given, but an **independent dealer buying** and selling in his own behalf." (Emphasis supplied.)

The District Court, as a predicate for the conclusion that "Dulaney's customers were Farris' customers and vice-versa" expressed the view

> "In truth, the arrangement was a paternalistic supervision of his own creation by Dulaney . . ."

Under Georgia law, "paternalism" does not transform an "independent dealer" into a "sales agent". This view has obtained since 1906 when the Georgia Supreme Court decided **Daniel v. Maddox-Rucker Banking Company**, 124 Ga. 1063, 53 S.E. 573. We quote (p. 1065):

> "The defendant insists that this contract created the relation of principal and agent, that the defendant was not responsible for any loss of weight in the cotton occasioned by the failure of the railroad company to promptly transport the cotton to Atlanta, that the weights of cotton at the place of purchase were correctly ascertained, and that the losses in weight caused by the delay in shipment fell upon his principal. We are unable to agree with his counsel in this contention. The plaintiff bank obligated itself to furnish, as the market fluctuated, a basis upon which it would take the cotton, at Atlanta weights, and guarantee the specified price to the defendant; and the plaintiff agreed, in addition thereto, to pay the defendant a commission of 25 cents for each bale purchased. There was no obligation on the part of the banking company to furnish money to the defendant with which to purchase the cotton. The advances which it made to him were entirely voluntary and for his accommodation. The business of the defendant was that of an independent cotton buyer who has prudently undertaken to arrange with a purchaser, in advance, to take such cotton as he might be able to buy on the basis of certain prices to be furnished him from time to time by such purchaser. The defendant thus sought to protect himself against sudden market fluctuations and to assure himself of a profit of at least 25 cents a bale on all cotton which he bought, in case there was no loss in weights at the delivery point and the cotton was properly classified on the

purchasing basis. If he was able to buy at a price less than that stated in the basis furnished him by the banking company, he would make an additional profit. The contract amounted to no more than an agreement to pay for cotton shipped to the banking company a specified price, on delivery at Atlanta, with an additional allowance of 25 cents per bale. **This agreement did not constitute the defendant the agent of the banking company.**" (Emphasis supplied.)

(b)

Covenant Extended Beyond Permissible Geographic Area

As entered the injunction prohibits sales to or solicitation of orders from twenty-five (25) concerns located in a geographic area extending from Syracuse, New York, southward to Miami, Florida, westward through Mobile, Alabama (including named cities in Louisiana, Mississippi, and Texas), to El Monte, California, and eastward to Merrill, Wisconsin (including named cities in Illinois and Indiana).

In **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 165 S.E. 2d 910, previously mentioned herein, the Supreme Court of Georgia considered a covenant by Fox "not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date **in any city of the United States** wherein he was, in the five (5) years preceding such termination date, employed or stationed by the company or any subsidiary of the company." The Court held:

> "The agreement not to engage in competition with the company or any subsidiary of the company is fatally defective and void because it is indefinite, and

for this reason unreasonable, in the description of the prohibited business."

Admittedly the Georgia Supreme Court did not there discuss geographical area. However, on October 14, 1970 (subsequent to the first review sought herein) it decided **Moore v. Dwoskin, Incorporated**, 226 Ga. 835, 177 S.E. 2d 708 and **Taylor Publishing Company v. Jones**, 226 Ga. 832, 177 S.E.2d 655. In **Moore** the Court held:

> "An employment contract which prohibits an employee from pursuing his trade or business **in the primary business areas of 31 states** is unreasonable, contrary to public policy, and void" (Emphasis supplied).

The thrust of this decision obviously is "the primary business areas of 31 states." **Taylor Publishing Company v. Jones**, supra, proscribed only the area "within the State of Georgia," but with the same result.

To the same effect are Georgia Supreme Court decisions in **Edwin K. Williams & Co.-East v. Padgett**, 226 Ga. 613, 176 S.E. 2d 800, holding void a covenant to not solicit "for himself or others the accounts served by Edwin K. Williams & Co. (Va.)" and **Colonial Life & Accident Insurance Company v. Byrd**, 227 Ga. 198, 179 S.E. 2d 746, prohibiting sale of insurance to customers of the insurer located in the "territory covered by this agreement."

It is no answer to say these were employment cases since **Fox** involved a Stock Purchase Contract, and the Supreme Court of Georgia has historically applied the same standards in sales of businesses or dissolution of partnerships as it applies to employment contracts, the only real difference emerging from the holdings being that in the sale of a business "it is not required that it be limited as to time." **Wood v. McKinney**, 205 Ga. 370, 371, 53 S.E. 2d 684.

II

The Public Policy of Georgia Has Been Ignored

As to matters of State law this Honorable Court stated in **Brady v. Maryland**, 373 U.S. 83, 90:

> "... state courts, state agencies and state legislatures are its final expositors under our federal regime".

The public policy of Georgia is embodied in **Georgia Code Section** 20-504, viz:

> "A contract which is against the policy of the law cannot be enforced; such are ... contracts in general restraint of trade ..."

Its court of last resort, by decisions hereinbefore quoted, has expressed views which should have received recognition by the Fifth Circuit Court of Appeals. Such failure to so recognize calls for the grant of certiorari as was done in

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538;

and

Meredith v. City of Winter Haven, 320 U.S. 228.

Jurisdiction was conferred upon the Federal Courts in diversity of citizenship cases to provide non-residents with a forum in which they might expect to receive equality of result with residents of the particular state. The limits of that jurisdiction were stated in **Angel v. Bullington**, 330 U.S. 183:

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Such limitation has not been observed here.

CONCLUSION

It is obvious the Fifth Circuit Court of Appeals, finding itself in disagreement with the public policy of Georgia, has declined to follow it. The admonition of **Erie Railroad Company v. Tompkins**, 304 U.S. 64, has been twice ignored in the instant case. The situation here presented can be rectified only by the grant of certiorari.

Respectfully submitted

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APPENDIX I

United States District Court
Northern District of Georgia
Rome Division

The Day Companies,
Plaintiff,
vs.
Claud T. Patat, Jr., John L. Farris and Patat Plywood Corp.,
Defendants.
Civil Action.
Number 1945.

This is an action for breach of a covenant not to compete entered into by the defendant Farris in connection with the sale of his plywood business to plaintiff. The particular covenant in question provides:

> "(6) John L. Farris, individually, agrees to remain in the employ of Farris until December 31, 1966, at a salary of Five Hundred and 00/100ths Dollars ($500.00) per month in an advisory and consulting capacity, it being understood that he shall not be required to keep regular hours or perform any detailed administrative or executive duties; the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five (5) years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

In a ruling on summary judgment on February 1, 1968, this court held the covenant valid as to "time of restraint." On appeal, the Fifth Circuit held the covenant valid as to "definiteness as to the nature, kind and character of the activities prohibited by the contract." **Day Companies v. Patat,** 403 F.2d 792 (5th Cir. 1968), **cert. den.** 397 U. S. 1117 (1969). It likewise held that the covenant was not invalid on its face for want of "definiteness and reasonableness as to the territory involved."

Following discovery and denial of summary judgment, the injunctive feature of the case came on for trial before the court. At issue is the meaning of the phrase "in competition with Farris in the area presently operated in by Farris." Such question is necessarily dependent upon the evidence, on which the court makes the following

FINDINGS OF FACT

In 1949 E. O. Dulaney of Louisville, Kentucky was president of General Plywood Corporation and John L. Farris was a vice-president and general production manager at its Savannah, Georgia, facility. At that time, Dulaney determined to go into business for himself and he formed the Dulaney Veneer Company at Cuthbert, Georgia, and employed Farris to be vice-president and general manager. Dulaney was apparently knowledgeable in the matter of plywood marketing nationally and he also created one or more sales corporations in Louisville, for such purpose, the principal one being known as Dulaney Plywood Corporation. Farris was strictly a production man in the industry and had sole charge of the Cuthbert plant for Dulaney. The combination of the talents of the two was apparently ultra-successful and for ten years the business flourished with the orders being obtained by Dulaney Plywood in Louisville and executed by Dulaney Veneer in Cuthbert. By the end of that period, the principal prod-

uct manufactured was "doorskins", which are plywood panels used for the fabrication of wooden doors by various door companies throughout the United States.

In 1959, partly to reward Farris for an outstanding job over the years, Dulaney sold the Cuthbert plant to him on very favorable terms to be satisfied, in the main, out of future profits. To effect the transfer, the Farris Plywood Company, Inc. was created, in which Farris and his family were the sole stockholders and it took over all of the physical assets of the Cuthbert plant. Dulaney continued to handle all of the marketing problems through the Dulaney Plywood Corporation in Louisville.

The actual method of operation was as follows: Dulaney Plywood would obtain an order from the trade and relay the requirements to Farris Plywood. Farris Plywood would execute the order and ship direct to the customer, invoicing Dulaney Plywood. Dulaney Plywood would remit to Farris Plywood and collect from the customer. With very minor and insignificant local sales, all of Farris Plywood's production was sold in this manner, and it manufactured only on order, maintaining little if any stock. All in all, Farris "counted on Dulaney to keep him going." During the period of 1959-1966, Farris Plywood had no salesman and the retail prices were all set by Dulaney. Conversely, Dulaney Plywood had no other source of "doorskins" except Farris, and maintained no warehouse or other storage facility for them. In 1959, Claud T. Patat was foreman of the Cuthbert Dulaney plant under Farris and was made vice-president of Farris Plywood on the change-over.

Early in 1966, Columbus Packing Company (the predecessor to plaintiff here, The Day Companies), a Mississippi plywood manufacturer, initiated inquiries through Jameson Investment Company of Birmingham, looking toward a merger with or purchase of Farris Plywood

Company. Following the initial contact, the negotiations were handled principally by Clarence C. Day, President of Columbus Packing and Farris for Farris Plywood. Upon agreement in principle at a total price of some $465,500 by those two, a meeting was arranged at Montgomery, Alabama, between them along with attorneys for the purpose of discussing the terms of the formal purchase agreement.

Prior to the meeting, Farris had a draft of a proposed contract prepared by his attorney, Jessie Bowles (D-3). Paragraph 6(d) provided: "The corporation will continue the verbal agreement presently existing between the corporation and Dulaney Plywood Corporation of Louisville, Kentucky, wherein the latter corporation is to handle the sale and marketing of products of Farris Plywood Company as heretofore, through the 1st day of October, 1966."

At the Montgomery meeting, another draft prepared by W. J. Threadgill as attorney for Day was presented and discussed paragraph-by-paragraph by the two principals and attorneys Bowles and Threadgill. This draft eventually became the basis of the executed contract (Exhibit "A" to amended petition). The draft proposal (D-2) provided in Paragraph 6 as follows:

> "(6) John L. Farris, individually, agrees to remain in the employ of Farris until December 31, 1966, at a salary of Five Hundred and 00/100ths Dollars ($500.00) per month and to perform such duties during said period for Farris as its board of directors may reasonably prescribe; the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five (5) years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris, and

during the aforesaid period of employment shall use his utmost endeavors to promote the business and the interests of Farris."

Considerable discussion surrounded this provision, Day insisting that he was "Not interested in buying if Farris didn't quit," but that he wanted him to continue for a reasonable period within the company. On the other hand, Farris stated he wanted to quit and had no intention of going back into business. Because of the technical requirements of Georgia law regarding non-competing covenants, the wording of Paragraph 6 was examined at length and various suggestions such as "the whole United States" were injected by the lawyers. The area of logging and labor supply around Cuthbert was also discussed. At the suggestion of Attorney Bowles for Farris, paragraph 6 was changed to read:

"(6) John L. Farris, individually, agrees to remain in the employ of Farris until December 31, 1966, at a salary of Five Hundred and 00/100ths Dollars ($500.00) per month in an advisory and consulting capacity, it being understood that he shall not be required to keep regular hours or perform any detailed administrative or executive duties; the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five (5) years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

At the meeting, Day discussed for the first time the nature of the sales arrangement with Dulaney. He thereupon insisted that it be continued so that he could receive payment on a weekly basis. Farris stated that Dulaney

handled "our established accounts" and that Farris customers were located "from New York to Texas." The provision regarding Dulaney was amended to provide:

> "Farris will continue the verbal agreement presently existing between said corporation and Dulaney Plywood Corporation, Louisville, Kentucky, with respect to the sale and marketing of products of Farris, until the first day of October, 1966, which said agreement is as follows: Sales to established accounts heretofore sold through Dulaney shall continue to be made through Dulaney, but at prices established by Farris."

Prior to execution of the contract, Farris revealed the proposal to Dulaney and received his approval to proceed as outlined.

The contract as finally executed on April 20, 1966, also provided for the continued employment of Patat for the remainder of 1966 at $1,000 per month plus a $10,000 year-end bonus (Par. 3a).

For some six months following the sale, the new owners operated through Dulaney Plywood as before with the same modus operandi as used previously. In September, Day undertook to terminate the arrangement between Farris Plywood and Dulaney Plywood and sent a new Farris vice-president, Norsworthy, to Louisville for that purpose. Dulaney became upset at this prospect and, as a result, Farris came to Louisville to enter the discussion. The upshot of the meeting was the formulation of an agreement by Norsworthy, Dulaney and Farris to buy out the Dulaney sales organizations (P-9), on condition that Dulaney and certain key employees be granted future employment contracts. On September 20, 1966, Farris Plywood under the new owner, executed such an arrangement (P-8), and in 1967 the name was changed to Farris Plywood.

Farris terminated all his connections with Farris Plywood on December 31, 1966, and Patat terminated his

employment there in mid-January, 1967. Patat considered several business possibilities and in February, 1967, decided to go into the doorskin business himself. As a friend, he discussed the matter with Farris and told him he was going to approach the Small Business Administration for a loan for such purpose. Upon refusal of the loan he again talked with Farris—this time with a view toward obtaining the backing of Farris in the venture. In the discussion, Patat was shown the sales contract with Columbus Packing, including specifically the non-competing covenant in question. After consultation with an attorney, it was decided that the covenant only had reference to the Cuthbert trade and logging area. Contact made by Patat with the Rockmart Chamber of Commerce, resulting in a favorable plant-arrangement there, some 175 miles from the Cuthbert plant. On this basis, the Patat Plywood Corporation was organized with Patat owning 250 shares and Farris owning another 250 shares of its capital stock in March, 1967. Patat was named as President and Farris as vice-president and treasurer. In addition, Farris (and his wife) loaned the corporation $100,000 on a demand note, secured by the new company's equipment. Immediately upon operation it began producing "doorskins" similar to those produced by Farris. Patat and Farris actively solicited customers formerly shipped by Farris through Dulaney and by January, 1968, substantially all of Patat's production was being purchased by the Wall Lake Door Company, a former major purchaser of Farris' production of birch "doorskins."

Following the filing of this suit, Farris sold his capital stock in Patat Plywood to Patat for $25,000, and resigned as an officer, director, and employee in December, 1968. He still holds the demand notes for $100,000, but neither he nor any member of his family has any other connection with or participation in the company nor has he engaged in any activity for the company since that time.

Patat and the Patat Company knew of the provisions of the covenant prior to beginning production and each was a beneficiary of Farris' activities thereafter.

CONCLUSIONS OF LAW

Construction of the covenant.

The court is of the opinion that this controversy arose over a situation completely unforeseen by the parties or their attorneys at the time of negotiations and sale. The business conflict which has developed was unanticipated by any of them at that time and, consequently, the contract language employed does not define the non-competing area with particularity nor does it clarify the meaning of "operations" by Farris, considering its unique arrangement with Dulaney. While the subsequent Farris-Patat venture appears not to have been contrived, nonetheless, it is clear that the parties are bound by their contract and, the Fifth Circuit having held that the covenant is enforceable, it devolves upon this court to place a proper legal construction upon it.

Considering the binding nature of the contract, the posture of the parties is one of complete apposition. Recognizing the significance of the Dulaney arraignment, the plaintiff contends that the covenant extends to the reasonable trade area of each consumer shipped by Farris, while the defendant contends that Dulaney Plywood was, in legal terms, its only customer, and that the area covered by the covenant is limited to the supply and labor area of Cuthbert. While the conversation at Montgomery appears to have been primarily directed to the nature of the Cuthbert area, the simple expedient of describing it was rejected and broader language employed. The court concludes, whether mutually intended or not, that the covenant in fact includes more, particularly in view of the

announced policy of the Georgia courts to give wider latitude to such restrictions in the case of a sale of a going business. **Day Companies v. Patat**, 403 F.2d 792 at 795(7), citing **Strauss v. Phillips**, 180 Ga. 641, **Morris-Forrester Oil Co. v. Taylor**, 158 Ga. 201, and **Legg v. Hood**, 154 Ga. 28.

Solution of the problem thus gets down to a reasonable view of the Dulaney arrangement. Its existence and true nature was well known to the parties at the time, as evidenced by the testimony and the language employed in the contract (See paragraphs 2 j and 3 d). Neither counsel nor the court can find a satisfactory legal label to describe the Dulaney arrangement. In a traditional commercial relationship, none of the possibilities from which some semi-automatic answer could be fashioned, such jobber, wholesaler, retailer, factor, or even customer, seem appropriate. In most respects it is most akin to that of a "sales agent." See **F. P. Williams Co. v. Colorado Milling and Elevator Co.**, 246 F.2d 240 (5th Cir. 1957); **Etablissements Rigaud v. Hoey**, 50 F. Supp. 598 (S.D.N.Y. 1942). However, most ordinary sales agents do not assume the financial risk of the consumer as here.

In such matters, the watchwords should be the "commercial realities" and "economic significances" of the factual situation. **Brown Shoe Co. v. United States**, 370 U. S. 294 at 325 (1961). In truth, the arrangement was a paternalistic supervision of his own creation by Dulaney, who doubtless wished for Farris to prosper over and beyond repayment of the purchase price. In any view of such a situation, the court can only conclude that Dulaney's customers were Farris' customers and vice-versa, as the former had no production and the latter no market without the other. Viewed from the strict posture of "trade area", the two coincide as Dulaney's trade area from Louisville encompasses the same users as shipped by Farris from Cuthbert.

If the covenant is to be given any viable meaning over and beyond the Cuthbert supply area, and it must, the commercial reality is that plaintiff be afforded protection in the sense that Dulaney's operations are, in fact, Farris' operations, and Dulaney's customers are, in fact, Farris' customers. Such is the ruling of the court.

Remedy

While the prohibition against Farris personally is absolute, as to the Patat Company, the plaintiff recognizes that in construing the territorial limits of the restraint, the restriction should be what is reasonably necessary for the protection of the business acquired. 43 C.J.S., **Injunctions** § 84. E. g. **Thomas v. Coastal Industries, Inc.**, 214 Ga. 832 (1959); **National Homes Corp. v. Lester Industries, Inc.**, 293 F. Supp. 1028 (W.D. Va. 1968). And reasonableness depends upon the facts and circumstances of each particular case. Here, there is no need to describe geographical areas, for the nature of the business is not to serve a geographic market, but a customer market. All that is needed in this respect for plaintiff's protection is relief as to customers. That is the true area in which Farris formerly operated and Patat now does. It is not unlike an unfair competition claim against the solicitation of former customers as a part of good will purchased. See 38 C.J.S., **Good Will**, § 7 ff. Thus, for example, it is reasonable to prohibit solicitation or sale to an existing customer in Houston, Texas, but it is not reasonable to prohibit solicitation or sale to a new or competing customer in the entire Houston trade area.

Accordingly, the direction of the court will be to enjoin the defendant Farris personally from engaging, directly or indirectly, in any capacity, in any business or employment in competition with Farris and specifically with the other defendants,[1] and to enjoin all of the defendants jointly

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[1] Plaintiff insists also that defendant Farris should be directed to call his loan to Patat Corporation, so as to divest his

from selling or soliciting any former Farris customers. Customers are defined as those purchasers named on Plaintiff's Exhibit 5 at trial, excepting therefrom:

Manhattan Door, Mespeth, L. I., N. Y.;
Boro S. W. Corp., Fort Worth, Texas;
Georgia Pacific, Orlando, Florida;
Hurd Millwork Corp., Medford, Wisconsin;
U. S. Plywood, Laurel, Mississippi,

all of whom were sold by Farris Plywood following the date of sale.

In order to afford defendants a reasonable opportunity to adjust to business necessities, such relief will be effective on September 1, 1970, and extend through the life of the contract. An order may be presented by plaintiff's counsel to such effect. The claim for damages is deferred for jury trial as agreed.

It Is So Ordered.

This the 13th day of July, 1970.

/s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

Filed in clerk's office and a true copy certified, this July 14th, 1970.

CLAUDE B. GOOD
Clerk

By: DAN DAVIS
Deputy Clerk

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connection therein. The court is convinced that Farris has, in fact, divorced himself from any active participation in the business as of December, 1968, and the court does not consider the position of creditor to be in violation of the covenant. Therefore, such relief will not be granted. Any action by Farris on behalf of the corporation would, however, constitute a violation of the order and, if shown, would subject him to sanctions for contempt, even if it were arguably motivated to strengthen his loan position.

APPENDIX II

In the
United States Court of Appeals
For the Fifth Circuit

No. 30415

The Day Companies, Inc.,
Plaintiff-Appellee,

versus

Claud T. Patat, Jr., John L. Farris
and Patat Plywood Corporation,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

(April 16, 1971)

Before Brown, Chief Judge, Coleman and Clark,
Circuit Judges.

Per Curiam: This is the second appearance of this case in this Court. Our prior decision is reported, 1968, 403 F.2d 792.

In a carefully considered opinion it was there held by a panel of this Court that a contract from a seller not to compete with his buyer was valid under Georgia law. The covenant not to compete was expressed in the following language:

> "the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris." 403 F.2d 793.

After remand, and upon trial to the merits, the parties vigorously disagreed about the meaning and extent of the covenant language, "*in the area presently operated in by Farris*".

Mr. Farris claimed that it was intended to apply only to his previously existing logging operations in and around Cuthbert, Georgia.

Day argued, of course, that the noncompetitive protection extended to former customers who bought Farris products and to the area in which they operated. There was much argument below, and here, as to whether Dulaney Plywood Corporation, through whom Farris made its sales, was a customer or a jobber or a wholesaler or a factor.

We think this issue was covered by what we said in the prior opinion:

> "Considering the challenge as to the territory prerequisite, was this covenant reasonable and definite as to the area involved here? The limitation in the covenant as to territory in the case at hand is found in the phrase 'in the area presently operated in by Farris'. The cases from the Georgia Courts seem to permit restraints which extend throughout the territory covered by a transferred business. As was ob-

served by Judge Jenkins of the Georgia Supreme Court in Kutash v. Gluckman, 193 Ga. 805, 20 S.E.2d 128 'a contract which affords a fair protection to the party in whose favor it is made, and is not injurious to the public * * * may extend to all the territory covered by the business the good will of which has been sold * * *'. We agree with the Court below that the standard of area is met in the agreement in question." 403 F.2d 794.

The District Court, upon remand, from which this appeal was taken, held that the covenant applied to all those customers who were purchasing manufactured goods produced by Farris at the time he sold the business. It seems clear to us that Day was entitled to that much relief, if not more. There is no cross appeal from the failure to include sales in the territorial areas occupied by these customers, so we intimate nothing on that point.

Claud T. Patat, Jr. and Patat Plywood Corporation argue that no injunctive relief should have been granted against them as they were not parties to the original contract. Nevertheless, there was evidence in the record to support the finding of the District Court that the Patats have knowingly been in complicity with Farris in violation of the contract not to compete.

There was no error below. The judgment of the District Court is

AFFIRMED

APPENDIX III

United States Court of Appeals
For the Fifth Circuit

October Term, 1970

No. 30415

D. C. Docket No. CA 1945
The Day Companies, Inc.,
Plaintiff-Appellee,
versus
Claud T. Patat, Jr., John L. Farris
and Patat Plywood Corporation,
Defendants-Appellants.

Appeal From the United States District Court for the Northern District of Georgia
Before Brown, Chief Judge, Coleman and Clark, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 16, 1971

Issued as Mandate:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1919 — 70-268

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

vs.

THE DAY COMPANIES, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

To the United States Court of Appeals
for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	2
Status of Dulaney	3
The Covenant Did Not Extend Beyond Permissible Geographic Area	4
The Public Policy of Georgia Has Not Been Ignored	8
Conclusion	8

Table of Cases Cited

Central Georgia Land & Lumber Company v. Exchange Bank of Macon, 101 Ga. 345, 28 SE 863	3
Daniel v. Maddox-Rucker Banking Company, 124 Ga. 1063, 53 SE 573	3
Fox v. Avis Rent-A-Car Systems, Inc., 223 Ga. 571, 156 SE2d 910	5, 6, 7
Hood v. Legg, 160 Ga. 620, 128 SE 891	4
Kutash v. Gluckman, 193 Ga. 805, 20 SE2d 128	5
Legg v. Hood, 154 Ga. 28, 113 SE 642	4, 5
Meredith v. City of Winter Haven, 320 U.S. 328	2
Taylor Freezer Sales Company, Inc. v. Sweeden Freezer Eastern Corporation, 225 Ga. 160, 160 SE2d 356	7
Vandenbark v. Owens Illinois Glass Co., 311 U.S. 538	2

Miscellaneous Cited

6 R.C.L. 798, § 200	4
397 U.S. 1111, 89 Sup. Ct. 993, 22 L. Ed. 2d 122	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1813

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

vs.

THE DAY COMPANIES, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

To the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

Petitioner's Statement of the Case is basically correct and accepted by the Respondent with the exception of Petitioner's comment concerning the decision of the Fifth Circuit Court of Appeals.

The facts necessary to a determination of this case are adequately set forth in the opinion of District Judge Sidney O. Smith, Jr. in his order dated July 13, 1970, set out as Appendix 1 to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit Court of Appeals is not in conflict with applicable Georgia law, but on the contrary, is fully supported by Georgia decisions cited by the District Court and the Court of Appeals.

The Fifth Circuit Court of Appeals did not ignore this Court's admonition in **Vandenbark v. Owens Illinois Glass Company,** 311 U. S. 538 and **Meredith v. City of Winter Haven,** 320 U. S. 328. **Vandenbark** involved a ruling by the Sixth Circuit Court of Appeals that cases in tort brought in Federal Courts on ground of diversity of citizenship are ruled by the State law as declared by the State's highest court when the judgment of the trial court is entered and not by the State law as so declared at the time of entry of the Appellate Court's order of affirmance or reversal. In that particular case, after the trial court had dismissed the plaintiff's petition, the Ohio Supreme Court reversed its former decisions, The Sixth Circuit Court of Appeals applied the law in effect in Ohio at the time of the trial court's action and not at the time the appeal was heard. This was the ruling which this Court considered on Certiorari and reversed.

Meredith concerned a decision of the Fifth Circuit Court of Appeals which declined to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida Courts had left in a state of uncertainty. This Court, on Certiorari, held at page 234:

> "But we are of opinion that the difficulties of ascertaining what the State courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a Federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."

The Fifth Circuit Court of Appeals in the instant case did apply the decisions of the Supreme Court of Georgia and did reach a decision. Just because Petitioner does not agree with the results reached by the Circuit Court is no reason for granting Certiorari. This case involves only the application of Georgia law to a private contract and is not a case wherein the Court of Appeads "has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

STATUS OF DULANEY

Petitioner argues that holding Dulaney Plywood Corporation was a "sales agent" is contrary to Georgia law. The District Judge stated in his opinion that the arrangement between Farris Plywood and Dulaney was unique and that "in most respects it is most akin to that of a 'sales agent' ". The trial court further said "in truth, the arrangement was a paternalistic supervision of his own creation by Dulaney, who doubtless wished for Farris to prosper over and beyond repayment of the purchase price. In any view of such a situation, the Court can only conclude that Delaney's customers were Farris' customers and vice versa, as the former had no production and the latter no market without the other."

Petitioner cites **Central Georgia Land & Lumber Co. v. Exchange Bank of Macon**, 101 Ga. 345, 28 SE 863. That case dealt with the relationship between a cotton buyer and a bank which financed him, a factual situation completely different from that existing between Dulaney and Farris.

Daniel v. Maddox-Rucker Banking Company (1906), 124 Ga. 1063, 53 SE 573, also involves a relationship between a bank and a cotton buyer. The bank had agreed to pur-

chase cotton from the buyer at a certain price and to pay the defendant a commission of twenty-five cents per bale in addition to the specified price per pound. This relationship is in no way akin to that existing between Dulaney and Farris in the instant case.

THE COVENANT DID NOT EXTEND BEYOND PERMISSIBLE GEOGRAPHIC AREA

Petitioner cites several Georgia cases which deal with covenants not to compete ancillary to employment contracts. The Georgia courts have consistently made a distinction between such contracts and those incorporated in the sale of a business. This distinction goes far beyond merely holding that in the sale of a business, it is not required that the covenant be limited as to time as argued by petitioner.

The Supreme Court of Georgia in **Hood v. Legg**, 160 Ga. 620, 128 SE 891, discussed in detail the subject of the territorial limits of an agreement not to compete ancillary to the sale of a going business and the rationale behind various decisions. The Court quoted its previous ruling in the case of **Legg v. Hood**, 154 Ga. 28, 113 SE 642, holding:

> "Such covenant will be reasonable and proper if it only affords a bare protection to the party in whose favor it is made, and is not injurious to the public. 6 R.C.L. 798, § 200, and cases cited in notes 20 and 1; and where it is of such character, it may extend to all the territory covered by the business the good will of which has been sold."

The Court further held in the ruling:

> "It seems fair and just, and also conducive to business integrity, that a person who purchases a business including the good will, for the purpose of extending

its scope 'is entitled to contract with his vendors against competition from them within the territory into which he designs to extend it, and that such contract is not opposed to public policy when the area which it embraces is not greater than that which the parties may fairly anticipate the extended business will cover.'"

From this it will be seen that the Supreme Court of Georgia has held that a covenant not to compete, ancillary to the sale of a business, may cover not only the area in which the business was operating but the area in which the new purchaser intended to expand the business. The contract between Columbus Packing Company, Inc. and Farris extended only to the area in which Farris Plywood Company was then operating and certainly could not be unreasonable as to territory.

The decision in **Legg v. Hood** was cited with approval and reaffirmed in **Kutash v. Gluckman** (1942), 193 Ga. 805 (20 SE2d 128).

Petitioner cites in support of its contention that the covenant extended beyond permissible geographical area, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 SE2d 910. Their petition also points out at page 5 that the opinion of the Fifth Circuit Court of Appeals in the prior appearance of this case, contained no reference to **Fox**. Petitioners made this same argument in their prior Petition for Certiorari to review the previous decision of the Fifth Circuit Court of Appeals, which was denied 397 U.S. 1111, 89 Sup. Ct. 993, 22 L.Ed2d 122. In its Response to the previous petition for Writ of Certiorari, The Day Companies, Inc. stated in part:

"The petitioner argues that the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S.E. 2d 910, which it alleges to be the latest decision of the Su-

preme Court of Georgia. This case was cited by petitioners in their brief in the Court of Appeals and in their petition for rehearing. Obviously it was carefully considered by the Court of Appeals.

"The decision of the Court of Appeals is in accord with the decision of the Supreme Court of Georgia in the **Fox** case. In that particular case Avis filed suit against Fox alleging in two counts violations of two separate contracts between Avis and Fox. The Court upheld an agreement in Count One that Fox would 'not engage in competition with ITT or any subsidiary of ITT in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of' the termination of his employment with the plaintiff for a period of two years after the termination date 'in any city in the United States where employee was employed or stationed by ITT or any subsidiary of ITT.' The second count which the Supreme Court held to be fatally defective contained language in which Fox agreed 'not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date in any city of the United States wherein he was, in the five year period preceding such termination date, employed or stationed by the company or any subsidiary of the company.' The Court held the contract was fatally defective and void because it is indefinite and for that reason unreasonable in the description of the prohibitive business. It will be noted that this involved a contract not to engage in competition with International Telephone and Telegraph Corporation or any subsidiary of the company. The contract dealt with in the second count did not restrict it to any business of ITT or any subsidiary in which the employee Fox had been engaged, but related to competition with

the company or any subsidiary of the company. It was obviously this language which the Court found to be too broad.

"The **Fox** case is easily distinguishable from the instant case. Here we are dealing with a situation where John L. Farris was the president and principal stockholder of Farris Plywood Company. This was the only business in which he agreed not to compete. Columbus Packing Company, Inc. paid the sum of $465,000.00 to purchase the capital stock of Farris Plywood Company and alleged that it would not have purchased the stock had not the president and principal stockholder as a condition of the sale agreed not to compete with Farris Plywood Company in the area in the business operated in by Farris for a period of five years.

The **Fox** case dealt with an employment contract and not with the sale of a business. A later case, **Taylor Freezer Sales Company Inc. v. Sweeden Freezer Eastern Corporation** (1968), 225 Ga. 160, 160 SE2d 356, decided March 7, 1968, also dealt with an employment contract. The Supreme Court of Georgia there reiterated the rule referred to above that whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court and held as previously pointed out:

> " 'Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract.' "

THE PUBLIC POLICY OF GEORGIA HAS NOT BEEN IGNORED

The Trial Court and the Fifth Circuit Court of Appeals did not ignore the public policy of Georgia in this case. The District Judge heard evidence in the case, argument of counsel and rendered detailed findings of fact and conclusions of law in which specific reference was made to the public policy of Georgia established in the statutory and judicial law of the State. The Circuit Court of Appeals had the benefit of briefs filed by the parties, the record and transcript in the case, and heard oral argument of counsel. The opinion of the Fifth Circuit reaffirmed its previous decision that the contract from the seller not to compete with his buyer was valid under Georgia law and that under the evidence heard by the District Court, that The Day Companies, Inc. was entitled to as much relief "if not more" than was granted by the District Court.

There was some intimation in the opinion that if The Day Companies had filed a cross appeal, the Circuit Court might have held that Respondent was entitled to greater relief than granted.

CONCLUSION

This case does not involve an instance where in order to obtain employment a prospective employee signs a contract that he will not compete with his employer over a certain period of time within a designated area. This case involves an able businessman who dealt at arms length in the sale of the stock he and members of his family owned in a corporation which he had developed. He agreed not to compete with the corporation which he was selling. He and his family accepted the sum of $465,000.00 in payment of the stock, and in less than ninety (90) days, he had violated his written agreement. The trial court properly enjoined further violation of the covenant by the defendants.

The United States Court of Appeals for the Fifth circuit has twice reviewed this matter and held that the contract in question is binding. In the most recent opinion, it held that The Day Companies, Inc. was entitled to the injunctive relief granted by the trial court. This Court has already denied Certiorari in this case in one instance.

The Petition for a Writ of Certiorari should be denied as it is manifest there is no ground for granting such a Writ in this case.

Respectfully submitted

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